Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,
Petitioner,

v.

COUNTY OF SANTA BARBARA *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a county may take a permanent easement over private property, and thereby deprive the owner of the right to exclude, without satisfying either the nexus or proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) or *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and without paying just compensation, solely because two decades earlier the State was able to "extort" from a prior owner an offer to dedicate that easement as a condition of obtaining a building permit?

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the Board of Supervisors of the County of Santa Barbara is a respondent in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph L. Cole, Trustee of the Stanford Farms Trust, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The California Supreme Court order denying the Petition for Review and Publication request is not reported. Appendix to the Petition of Certiorari ("Pet. App.") 20a. The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Six, affirming the judgment of the Superior Court of the State of California for the County of Santa Barbara is not reported, but can be found at 2001 WL 1613856. Pet. App. 1a-16a. The opinion of the Superior Court of the State of California for the County of Santa Barbara sustaining respondent's demurrer to petitioner's constitutional claims without leave to amend and granting respondent's motion to dismiss petitioner's claim under the California Environmental Quality Act is not published. Pet. App. 17a-19a.

JURISDICTION

The judgment of the California Supreme Court was entered on March 13, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. At its core, this case poses a simple and important question: can local governments evade the restrictions on compelled dedication of public access easements that this Court announced in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), through the expedient of taking private property in two discrete steps, neither of which may be challenged as an unconstitutional taking? In *Nollan*, this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case arises from a 1980 Coastal Commission permit decision that employed a slightly different, and far more typical, form of extortion: as a condition of approving a 570 square-foot addition, the Coastal Commission required petitioner's predecessor-in-interest not to convey an access easement outright, but to record an offer to dedicate a 77,000 square-foot easement – an offer that would expire in 21 years unless accepted by another local governmental entity.

In the decision below, the lower court ruled that the County of Santa Barbara was free to accept this coerced offer to dedicate without paying any compensation for the resulting easement and without having to demonstrate any nexus between any alleged adverse impacts caused by the owner's construction project and the easement she was required to offer. According to the lower court, the prior property owner's failure to bring a takings challenge to the 1980 permit decision – a decision that did not itself deprive the prior property owner of any possessory interest in her property, and did not compel such a deprivation at any time

thereafter – barred petitioner's prompt challenge to the legally distinct governmental action of the County, which accepted the coerced offer to dedicate in 2000 and thereby first stripped petitioner of the fundamental right to exclude others from the Trust's beachfront property. Unless this Court grants review of the decision below, other local governments in California will be free to accept literally hundreds of soon-to-expire offers to dedicate easements, all of which were coerced in blatant violation of the restrictions announced in *Nollan*, and all of which can now be accepted, under the decision below, without satisfying the commands of the Fifth Amendment.

2. In the late 1970s, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate easements over their beachfront to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would expire. Conversely, acceptance conveyed actual title to the public access easement to the accepting agency in perpetuity.

Acceptance of such offers, however, was by no means certain. An accepting entity had to ensure that it was able to assume the often significant liabilities and maintenance costs that attend ownership of public beach property. *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Cal. Ct. App. 1985). In addition, because local governments would not accept an easement that the public could not reach (and thus could not use), the acceptance of an offer to dedicate often depended on whether the Coastal Commission could extort offers to dedicate easements over neighboring properties, an event that depended, in turn, on whether the owners of such neighboring property would seek construction permits from the Commission. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Cal. Ct. App. 1985).

In 1980, Francice Bushkin applied for a coastal development permit to build an addition to an existing

guesthouse on her a 25-acre parcel of property in Santa Barbara. Pet. App. 1a. The proposed addition was to consist of a 196-square-foot sunroom and a 374-square-foot deck, or a total of 570 square feet. *Id.* Although these improvements were to be built 920 feet inland from a 60-foot coastal bluff, on property accessible only by a private road, the Coastal Commission refused to grant Bushkin a permit unless she agreed to record an offer to dedicate a 77,000 square-foot public lateral easement across her beachfront property (*i.e.*, an easement running parallel to the ocean). See *id.* at 1a-2a. The Commission made no finding that the proposed addition had any impact on public access to the beach, nor could it have done so: the modest 570 square-foot improvements to the property were not visible from any public roadway or from any beach.

Bushkin accepted the building permit, built the sunroom and deck, and recorded an offer to dedicate the easement in May 1982. The offer to dedicate was to expire unless it was accepted by a public agency within 21 years of its recordation. The Stanford Farms Trust acquired the Bushkin property, subject to the offer to dedicate, in 1995, eight years after this Court handed down its decision in *Nollan*.

By the late 1990s, the Commission had collected over 1,000 offers to dedicate public easements across private coastal property, but very few, if any, had been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. On October 6, 1998, the County of Santa Barbara conducted a public hearing to consider whether to accept 72 outstanding offers to dedicate easements over coastal property located in the County, including the offer to dedicate recorded by Bushkin. The Trustee for the Stanford Farms Trust appeared at the hearing and objected to the proposed acceptance of the offer to dedicate an easement over the Trust's property on the

grounds that acceptance would violate the requirement, set forth in *Nollan* and in this Court's subsequent decision in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), that a compelled easement must be roughly proportionate to the nature and extent of any adverse impact caused by the underlying construction project. The County decided to delay action on 26 offers to dedicate, including the offer to dedicate affecting the Trust's property.

On October 16, 1998, the Trust recorded a Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement with the Santa Barbara Recorder's Office. The Notice stated that the offer to dedicate was revoked and rescinded on the basis of *Nollan* and *Dolan*. The Notice was recorded to give effective legal notice to all interested parties of the Trust's claim that the offer to dedicate was invalid after *Nollan*, and that the Trust therefore was entitled to rescind the offer to dedicate. On October 16, 1998, the day the Notice was recorded, the Trust's attorneys sent the Notice to the County, advising the County that the Trust had revoked the offer. Pet. App. 3a.

On March 15, 1999, the Coastal Commission issued a "cease and desist" order, directing the Trust to cancel the Notice of Revocation and to refrain from engaging in any further activities that would be inconsistent with the previously issued permit. Pet. App. 3a. This order exposes petitioner to civil penalties of up to $6,000 a day for failure to comply. In addition, petitioner is exposed to civil penalties of up to $15,000 a day for failure to comply with the original permit condition. See Cal. Pub. Res. Code §§ 30821.6 & 30820(b). In April 1999, the Trust filed a complaint against the Commission, seeking declaratory relief, rescission of the irrevocable offer to dedicate, and a writ of mandamus. Pet. App. 3a.

While that action was pending,[1] the County moved ahead with its efforts to accept the offer to dedicate that the Coastal Commission had extracted from Bushkin. On February 15, 2000, the County adopted a resolution accepting the lateral easement across the entire beachfront of the Trust's property. In so doing, the County conducted a substantive review of the proposal to accept the outstanding offers to dedicate within its jurisdiction, but refused to consider whether acceptance would violate the Trust's constitutional rights in light of *Nollan* and *Dolan*. The County made no effort to show that its acquisition of the easement satisfied the nexus and proportionality requirements of the Fifth Amendment, and instead simply recorded its acceptance of the offer to dedicate on March 23, 2000.

On April 17, 2000, fewer than 30 days after the County accepted the offer to dedicate, petitioner filed this action against the County. The complaint, as amended, included claims for redress under 42 U.S.C. § 1983 for violations of substantive and procedural due process and equal protection, and a request for a declaration under § 1983 and the California Code of Civil Procedure that acceptance of the offer to dedicate violated the Fifth and Fourteenth Amendments of the United States Constitution.

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[1] In January 2000, after petitioner's suit against the Coastal Commission was transferred from Los Angeles County Superior Court, the San Francisco County Superior Court sustained the Commission's demurrer to petitioner's first two causes of action. Petitioner filed a writ of mandate in the Court of Appeal seeking to set aside the order sustaining the demurrer, but the writ was denied. Thereafter, he filed a motion seeking to strike the Coastal Commission's cross-complaint as a Strategic Lawsuit Against Public Participation under the California Code of Civil Procedure § 425.16, and that motion was denied, as was the subsequent petition for writ filed in the Court of Appeal. Petitioner's lawsuit against the Coastal Commission, which does not give rise to this petition, is still pending in the San Francisco Superior Court.

The County filed a demurrer and a motion to dismiss. Notably, the County did not contend that its acceptance of the offer was lawful under *Nollan* and *Dolan*. Instead, the County alleged that petitioner's challenge was an untimely and improper collateral attack on the *original permit condition* and was thus barred by principles of res judicata and waiver. Relying on § 30801 of the California Public Resources Code, which governs judicial review of Coastal Commission decisions, the County argued that the taking challenge petitioner asserted could only have been brought within 60 days of the Coastal Commission's original permit decision in 1980. The County further argued that the Trust lacked standing as a subsequent owner that had purchased the property after the easement had been irrevocably conveyed.

In opposition, petitioner noted that the complaint did not challenge the actions of the Coastal Commission or the original permit condition, but instead challenged the County's wholly separate and legally distinct action of accepting the coerced offer to dedicate. Petitioner noted that this challenge to the County's actions was timely under section 30802 of the Public Resources Code, which provides for judicial review of decisions and actions of local governments implementing certified local coastal programs, because the County did not take final action to acquire the easement until March 2000. Petitioner also argued that his challenge was timely under 42 U.S.C. § 1983. Nevertheless, on December 13, 2000, the Superior Court sustained the demurrer without leave to amend.[2]

3. The Court of Appeal affirmed that judgment in an unpublished opinion filed on December 17, 2001. The Court of Appeal did not dispute petitioner's showing that, after the

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[2] The Superior Court also granted the County's motion to dismiss petitioner's claim under the California Environmental Quality Act. Although petitioner pursued that claim in his appeals below, his state law claim is not subject to review in this Court.

Coastal Commission's 1980 permit decision, the Trust had retained valuable property rights in the portion of the land subject to the offer to dedicate, and that those rights were not extinguished until the County accepted the offer in 2000. Instead, the court adopted the County's argument that any challenge to the County's acceptance of the offer to dedicate was an impermissible collateral attack on the 1980 permit itself. Noting that Bushkin had failed to challenge the permit decision by filing a petition for a writ of administrative mandate under Public Resources Code § 30801, Pet. App. 7a, the court concluded that the Commission's permit decision, and the offer to dedicate that it compelled, were "immune from collateral attack and that the causes of action set forth in the trustee's amended complaint are barred by the doctrines of res judicata and waiver." *Id.* at 11a. The court reasoned that "[t]he validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint," and that petitioner's claims "are derived from and dependent upon the original permit condition the predecessor in interest failed to timely challenge." *Id.* at 12a. The court concluded that "[t]o allow the instant challenge to the permit condition would circumvent the system of review provided under Code of Civil Procedure section 1094.5." *Id.* The court did not address petitioner's contentions that the challenge was timely under both California Public Resource Code § 30802 and 42 U.S.C. § 1983.

The court also dismissed petitioner's contention that a takings claim seeking compensation for the loss of the right to exclude others was not ripe until the County accepted the offer to dedicate. Petitioner, citing *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), argued that no governmental entity had reached a final decision as to the disposition of the Trust's property until the County chose to accept the offer to dedicate. In addition, petitioner noted that the County itself had admitted that no easement was created by the offer to dedicate – an admission that was wholly inconsistent with any

contention that the Trust's taking claim was ripe in 1980. Finally, petitioner noted that the County's ripeness theory would lead to undeserved windfalls: an original property owner would be entitled to recover compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, might be suffered only by a subsequent property owner. Failing to address these arguments, the court below dismissed the Trust's ripeness arguments on the ground that *Palazzolo* "does not address the situation . . . where the predecessor in interest acquiesced in the restriction and accepted the benefits." Pet. App. 14a.

Petitioner filed a Petition for Review in the Supreme Court of the State of California on January 25, 2002. On March 13, 2002, the California Supreme Court denied the Petition for Review.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeal adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the County of Santa Barbara to take a 77,000 square-foot easement that, in plain contravention of this Court's holdings, is wildly disproportionate to the construction project to which the easement is tied, and for which the County will never pay a penny in compensation. The California Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec.

17, 2001). The lower court's failure to prevent such open flouting of this Court's rulings is a compelling ground, in and of itself, to justify review of the decision below.

But a blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar the court of appeal adopted rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the County's conduct caused. Notwithstanding the Coastal Commission's exaction of an offer to dedicate an easement, the Trust continued to enjoy the fundamental rights to use its property and to exclude others from that property. It was the County's acceptance of the offer to dedicate that stripped the Trust of these fundamental rights. By failing to recognize the separate deprivation that the County's conduct caused, the lower court allowed the County to violate the Trust's constitutional rights with impunity.

Second, the lower court's procedural rule rests on a clearly mistaken understanding of ripeness principles in the takings context. Because the Coastal Commission's permit decision neither stripped the Trust of its right to exclude others nor necessarily compelled such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in a 1980 challenge to the Commission's decision. Plainly, any challenge to *County* conduct that did not occur until 2000, and that might never have occurred, was in no sense "ripe" in 1980.

As a direct result of these errors, the County escaped its "categorical duty" to pay compensation for an appropriation of property that "dispossesse[d] the owner [of its] right to exclude others," *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, No. 00-1167, slip op. at 18, 20 n.19 (U.S. Apr. 23, 2002), *available at* 2002 WL 654431, and the Coastal Commission was improperly allowed "to put an expiration date on the Takings Clause." *Palazzolo*, 533

U.S. at 627. Absent review by this Court, moreover, these constitutional violations will by no means be isolated. The decision below clears the way for acceptance of literally hundreds of other coerced offers to dedicate easements that are due to expire in the next few years – offers that the Coastal Commission is making every effort to ensure are accepted. In addition, the decision below provides a clear roadmap that other States may use to escape the commands of *Nollan* and *Dolan* and to appropriate beachfront and other valuable easements without paying any compensation.

I. THE COUNTY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency coerces a property owner to record an *offer* to dedicate a public access easement that does not satisfy the substantial nexus requirement announced in *Nollan* and *Dolan*, and a separate governmental entity later *accepts* that offer, does the latter decision work a legally distinct deprivation of property without just compensation? The court of appeal concluded that it does not, and that any constitutional injury the property owner suffers flows from the initial decision to compel the offer. That conclusion, which is one of the central predicates underlying the lower courts procedural bar, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not require the original property owner, Ms. Bushkin, to convey title to the easement outright. Rather, it demanded that she record only an offer to dedicate an easement. By its terms, this offer to dedicate was made irrevocable for a period of 21

years; if it was not accepted during that period, the offer would expire.

Under California law, it is well-established that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to the easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency").

The corollary to this rule, of course, is that an offer to dedicate does not itself divest the property owner of the right to use the subject property or to exclude others from that property. To the contrary, Ms. Bushkin retained the essential bundle of rights that attach to ownership of property. Indeed, in *Grupe*, the court explained that an offer to dedicate like the one at issue here created "no easement and respondent can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whalers' Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission required Ms. Bushkin to execute an offer to dedicate a lateral easement, she retained full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as

property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's permit decision render the loss of these rights inevitable. In fact, the likelihood that the easement would be accepted was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02. And of course, if no public agency formally accepted the offer to dedicate within 21 years of recordation, the offer would expire by it terms and the owner of the property would retain title completely unburdened by the offer. See *id.* at 602.

It is thus clear that it was the County's acceptance of the offer to dedicate in March 2000, and not the Coastal Commission's 1980 permit decision, that deprived the Trust of the right to use the 77,000 square feet of property and to exclude others from that property. As a result of the County's acceptance, the Trust is forced to bear what amounts to a "'permanent physical occupation'" of its property, by virtue of the public's unfettered right to use the land "to pass to and fro," *Nollan*, 483 U.S. at 832, and petitioner's right to exclude others has been permanently extinguished. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 723 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"). As a matter of federal constitutional law, the County's acceptance of the offer to dedicate worked a legally distinct deprivation of property for which the County either must pay compensation or demonstrate that the nexus and proportionality requirements of *Nollan* and *Dolan* have been satisfied.

In concluding otherwise, the court of appeal reasoned that "[t]he validity of the permit condition underlies all of the causes of action alleged in the trustee's amended complaint," and that petitioner's claims "are derived from and dependent upon the original permit condition the predecessor in interest failed to timely challenge." Pet. App. 12a. Although the Coastal Commission's decision to impose the unconstitutional

condition was plainly a necessary predicate for the County's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the offer to dedicate, the County made a purely discretionary decision that was not compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original permit decision made possible but did not, by itself, cause. See *Whalers' Village Club*, 220 Cal. Rptr. at 14-15.[3]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the County, the County's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

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[3] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate an easement for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

II. NO CHALLENGE TO A DEPRIVATION OF THE TRUST'S RIGHT TO USE THE PROPERTY AND TO EXCLUDE OTHERS FROM IT WAS "RIPE" IN 1980.

The decision below also rests on a fundamental misapprehension of federal ripeness principles. That misapprehension led the lower court to adopt a procedural rule that barred judicial review of a valid takings claim, and thereby impermissibly "relieve[d] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that perceived notions of administrative efficiency cannot trump the requirements of the Takings Clause.

This Court has consistently ruled that a property owner may not pursue a takings challenge until there has been a final government decision. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620 (property owner cannot establish a takings challenge "before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation"). Under California law, it is clear that no state agency made a final decision to divest the Trust of its right to use and exclude others from the beachfront property until the County finally accepted the offer to dedicate in March 2000. Thus, any claim the original property owner could have brought seeking redress for a physical taking would have been entirely premature in 1980; at that time, and for nearly 20 years thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The court of appeal's conclusion that petitioner's claims were barred by Bushkin's failure to file a petition for a writ of administrative mandamus within 60 days of the Commission's 1980 permit decision is flatly inconsistent with these ripeness principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the County's acceptance of the offer to dedicate was not "ripe" when the offer to dedicate was recorded, and that Bushkin could not have brought (and thus could not have waived) any challenge to that taking in 1980. Indeed, the court of appeal's flawed reasoning would allow a recording landowner to obtain an undeserved windfall – she would be entitled to compensation for the full value of a property loss that might never come to pass, or, as happened in the present case, that might be suffered by a subsequent property owner. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

None of the policies the court of appeal cited below, moreover, supports its procedural bar. The court noted that:

> "[o]nce aware of a challenge from whatever source, an agency can cancel, change, or stay enforcement of a challenged action, or otherwise mitigate damages. On the other hand, if persons affected by adverse administrative actions – be they landowners, permit applicants, or others – were permitted to refrain from challenging such actions until mitigation of damages by the government becomes impossible through the passage of time or events, and then present monetary claims, the financial burden on government could become overwhelming."

Pet. App. 11a (quoting *Patrick Media Group, Inc.* v. *California Coastal Comm'n*, 11 Cal. Rptr. 2d 824, 836-37 (Cal. Ct. App. 1992)). Petitioner asserted his taking claim, however, in a manner that is fully consistent with the policies the court of appeal relied on to justify preclusion of that

claim. He afforded the County – the state entity that actually deprived the Trust of its fundamental property rights – ample warning and opportunity to avoid exposure for takings damages, by repeatedly urging the County not to accept an easement that bore no substantial nexus or rough proportionality to the construction project to which the easement was tied. Petitioner then brought suit within 30 days of the County's acceptance of the offer to dedicate, not "three or five years later . . . [when] meaningful governmental fiscal planning . . . [became] impossible," *Patrick Media Group, Inc.* v. *California Coastal Commission*, 11 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 1992); indeed, petitioner claims that the taking dates only from March 2000, not May 1980, when the Commission imposed the original permit condition.

In all events, this Court has made clear that the type of policy considerations that the court of appeal cited cannot justify a procedural scheme that forecloses judicial review of valid takings claims. In *First English*, this Court addressed a procedural scheme that prohibited landowners from challenging a "regulatory" taking in an action for inverse condemnation, and thus effectively barred compensation for temporary takings. Citing the "need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy," the California Supreme Court had held, in *Agins* v. *Tiburon*, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980), that a landowner must first establish that a regulation is excessive in an action for declaratory relief or for a writ of mandamus, and thus cannot recover damages for any "temporary" taking that occurs prior to the government's decision to withdraw the regulation in response to a court finding of excessiveness. *Id.* at 29-31. Although this Court acknowledged the validity of the policies that led to the adoption of this procedural scheme, *First English*, 482 U.S. at 317, it held that a State may not adopt a review scheme that "relieve[s] it of the duty to provide

compensation for the period during which the taking was effective." *Id.* at 321.

So too here, policies supporting prompt review of administrative action cannot compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding all judicial review of an unquestionably meritorious takings claim. The California legislature itself has explicitly recognized that local governments play a role, separate and unique from that of the Coastal Commission, in implementing coastal programs and has provided a separate remedy for any injuries that local governments cause through such implementation. See Cal. Pub. Res. Code § 30802 ("[a]ny person . . . aggrieved by the decision or action of a local government that is implementing a certified local coastal program . . . ha[s] a right to judicial review of such decision or action"). The decision below improperly forecloses this avenue of redress, as well as that provided under 42 U.S.C. § 1983, for an unconstitutional taking based on a procedural waiver rule that is irreconciliable with governing ripeness doctrine. This Court should grant the petition to confirm that preclusion of such valid takings claims is impermissible, and cannot be justified by claims of administrative efficiency.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Unless this Court grants review, the unconstitutional taking of coastal property that occurred in this case will not be an isolated incident. First, literally hundreds of other offers to dedicate easements that the Coastal Commission coerced before this Court's decision in *Nollan* are due to expire soon, and the Commission has made clear its intention to secure acceptance of as many of these easements as possible. See James Rainey, *Faster Action by Agencies Is Preserving Beach*

Access, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956. If this Court declines to review the decision below, local governments throughout California will understand that they are free to accept these outstanding offers to dedicate without fear of incurring takings liability.

Indeed, absent review by this Court, it is unlikely that many other property owners will even attempt to challenge such acceptance decisions. In its zeal to obtain acceptance of hundreds of outstanding offers to dedicate easements, the Coastal Commission took the extraordinary step of enjoining petitioner from resisting such efforts, and is threatening him personally (not as trustee) with fines amounting, at this point, to potentially tens of millions of dollars for challenging an offer to dedicate an easement that does not comply with the requirements set forth in *Nollan* and *Dolan*. Should this Court deny review in this case, few litigants will have either the financial wherewithal or the resolve to withstand such administrative intimidation in the future. This Court condemned the Coastal Commission's strong-arm tactics in *Nollan*; it should not blink at them now when the effect will be precisely the same, *viz.*, uncompensated takings of property.

Second, the decision below provides a clear roadmap that other States can use to escape the Court's holdings in *Nollan* and *Dolan*. Rather than employ direct extortion as in *Nollan*, government entities can use the "offer to dedicate" scheme to avoid paying for their takings. Most landowners will have little incentive to mount a takings challenge to a permit condition that coerces an offer to dedicate given (1) the remote likelihood that such an offer will ever affect the current landowner, and (2) the reality that any such challenge is unripe. Thus, the government can compel such offers with impunity, then wait years to implement the actual taking, and resist subsequent compensation claims based on the waiver and res judicata principles endorsed below. The resulting procedural whipsaw thus prevents the truly injured landowner

from challenging the real taking because no one acted in response to the largely trivial action taken earlier.

Finally, this case presents a particularly good vehicle for resolving an important issue affecting hundreds of coastal property owners. Petitioner's challenge to the unconstitutional taking committed by the County of Santa Barbara has been clearly and squarely presented from the outset of this litigation, and he has exhausted his state court remedies. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the promise of *Nollan* and *Dolan* completely illusory.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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